IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 30TH JULY 2007 / 8TH SRAVANA 1929

CRL.A.No. 318 of 2001()

(ST.NO.163/98 OF CHIEF JUDICIAL MAGISTRATE, KOZHIKODE)

APPELLANT:

V. PERUMAL SWAMI, S/O. M. VENKITARAMAN,
17/1540, CHINTAVALAP FLATS (F2),
RAM MOHAN ROAD, PUTHIYARA P.O.,
CALICUT.

BY ADV. SRI.V.G.ARUN

RESPONDENTS:

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1. K. SAILENDRANATH,
MANAGING PARTNER,
ASSOCIATED BUILDERS,
30/2285, MAHIMA, CHEVAYUR.

2. M/S. ASSOCIATED BUILDERS,
REP. BY ITS MANAGING PARTNER,
K. SAILENDRANATH, K.J.S COMPLEX,
KOZHIKODE.

BY ADV. SRI.P.M.MOHAMED ALI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAKN, J.

CRL.A.NO.318 OF 2001

Dated this the 30th day of July, 2007.

JUDGMENT

This appeal is filed against the order passed in S.T.No.163/1998 on the file of the Chief Judicial Magistrate Court, Kozhikode. By the impugned order, the trial court acquitted the respondents/accused on the ground of absence of the complainant/appellant before the court on 15.4.2000.

2. This Court heard the learned counsel appearing on either side. The learned counsel appearing for the appellant submits that the order impugned is not in accordance with the provisions of Section 256 of the Code of Criminal Procedure and not in conformity with the dictum laid down by this Court in the judgments reported in **Don Bosco v. Partech Computers Ltd. (2005 (2) KLT 1003) and K.M. Basheer v. C.B. Shaji. (2006 (1) KLD (Crl) 497.** In the above two judgments, this Court had specifically held that an order under Section 256 shall not be passed only on the absence of the complainant and the order shall be passed only after applying the judicial mind of the court. Mechanical passing of an order without

judicial application of mind would cause unbearable hardships. Apart from the above two judgments, the Apex Court had stated in the judgment reported in **Associated Cement Co. Ltd. v. Keshvanand** (1998 (1) KLT 179) that an order under Section 256 shall be passed only in such circumstances and not as a mechanical disposal of the case. Paragraph 17 of that judgment reads as follows:

> 17. Reading the section in its entirely would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate, considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reasons. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

In the light of the principles laid down by this Court as well as

the Apex Court, this Court is of the view that the judgment under appeal is not sustainable in law. Accordingly, the judgment is set aside and the appeal is allowed. The trial court is directed to reconsider the matter afresh as per law from the stage at which the impugned order has been passed. The parties shall appear before the court on 07.09.2007.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAKN, J.

CRL.A.NO.318 OF 2001

JUDGMENT

30th day of July, 2007.